



Employment Agreements and Termination Clauses – the Most Recent Developments in the Law

Labour, Employment and Human Rights Group Webinar

September 17, 2025

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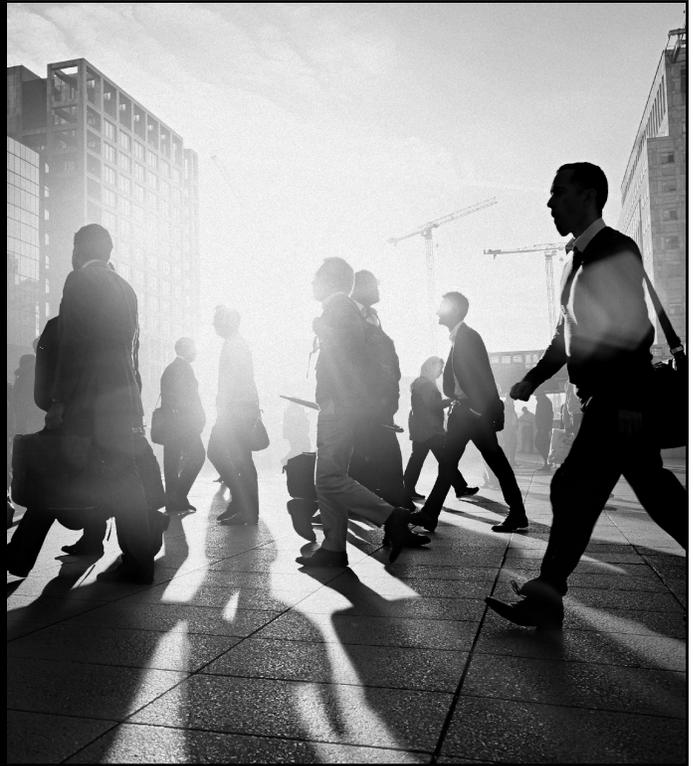


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▼ Agenda

- The *Employment Standards Act, 2000*
- The Termination Clause
- Recent Developments in Caselaw
- Beyond the Termination Clause

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▼
*The Employment
Standards Act,
2000*

▼ *Employment Standards Act, 2000*

- Sets out minimum employment rights and entitlements of most employees
- Section 5 of the ESA prohibits employers and employees from contracting out of or waiving employment standards established by the ESA. If this occurs, it is void

▼ *Employment Standards Act, 2000*

- Section 54 of the ESA provides that no employer shall terminate the employment of an employee who has been continuously employed for three months or more unless notice (written or pay in lieu) has been given to the employee
- Section 55 of the ESA states that prescribed employees are not entitled to notice of termination or termination pay

▼ *Employment Standards Act, 2000*

- Section 64(1) provides for severance pay to an employee with five years or more of service with the employer, and only if the employer has a payroll of \$2.5 million or more
- Section 64(3) provides that prescribed employees are not entitled to severance pay under this section

▼ Who are “prescribed employees”?

- Section 2 of *O. Reg. 288/01: Termination and Severance of Employment*, sets out which employees are not entitled to notice of termination or termination pay
- Section 9 of *O. Reg. 288/01: Termination and Severance of Employment*, sets out which employees are not entitled to severance pay
- In all other instances, employees will be entitled to at least statutory notice and severance pay, if applicable

▼ “Wilful Misconduct” under the ESA

- Extremely high standard
- Employer must demonstrate:
 - The conduct complained of is ‘wilful’
 - Careless, thoughtless, heedless, or inadvertent conduct, no matter how serious, does not meet the standard
 - Misconduct must be intentional or deliberate, purposeful, employee must know it to be serious misconduct
 - To put it colloquially, the employee must be “being bad on purpose.”
- If an employee is terminated for cause that does not meet the definition of wilful misconduct, disobedience, or wilful neglect of duty, then the employee must receive their minimum entitlements under the ESA

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▼ Wilful Misconduct v Just Cause

Ontario: common law “just cause”

- Lower than “wilful misconduct” under the ESA
- Recent case law reinforced a category of termination that is between “wilful misconduct” and “without cause” that disentitles the employee from common law reasonable notice, while still entitled to ESA termination provision
- *Render v. ThyssenKrupp Elevator (Canada) Limited*, 2022 ONCA 310

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The Termination Clause



ESA v Common Law

Employment Standards Legislation

- Minimum legal requirement
- Notice of Termination / Pay in Lieu
- Severance Pay (Ontario only)
- Pay all wages & accrued vacation pay within specified time after termination
- Benefits continuation

Common Law

- Applies if no valid termination clause in employment contract
- Determined by court on case-by-case basis
- “Ballpark” of 1 month per year of service up to normal maximum of 24 months
- All entitlements continue

▼ Limiting to Employment Standards

- Employees can be capped to minimum employment standard termination entitlements if there is a properly drafted termination provision in written contract
- Cannot provide less than minimum standards or contract out of any protections. If they do, void and employee is entitled to common law reasonable notice of termination without cause
- Common areas of violation:
 - ON – definition of cause that does not comply with ESA
 - Failing to specify all entitlements will be provided

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▼ Contracting out of the Common Law

- Contracting out of common law reasonable notice: *Machtinger v. HOJ Industries*, [1992] 1 S.C.R. 986
 - Employers can displace/rebut the implied obligation to provide common law reasonable notice in the event that an employee is terminated without cause
 - It is permissible for an employer to limit an employee's entitlement to only the minimum payments under employment standards legislation

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Termination: Without Cause

- Termination provisions that do not meet employment standards minimums at the time of termination are void *ab initio*
- The same is true if the termination provision could, at any given point in time, violate employment standards minimums
 - E.g. (Ontario). Termination provision provides for two weeks' notice or pay in lieu of notice per year of completed service. No further entitlements
 - Provision = void

Termination: Without Cause

- *Wright v. Young & Rubicam*, 2011 ONSC 4720 (at para. 36):
 - “There is, in my view, no particular difficulty in fashioning a termination clause that does not violate either the minimum standards imposed by the *Employment Standards Act* or the prohibition against waiving statutory minimum requirements and there is no compelling reason to uphold a termination clause which the draftsman may reasonably be understood to have known was not enforceable either at all or under certain circumstances.”

▼ *Waksdale v. Swegon North America Inc.*, 2020 ONCA 391

- Termination clause void for violating the ESA
- Failed to distinguish between common law cause and cause as defined in the Regulations
- Ambiguity ruled in favour of employee
- Non-compliance in any part of a termination provision renders entire section void

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▼ *Henderson v. Slavkin et al.*, 2022 ONSC 2964

- **Conflict of interest:** A failure to comply with this clause [...] constitutes both a breach of this agreement and cause for termination without notice or compensation in lieu of notice
- **Confidential information:** In the event that you breach this clause while employed by the Employer, your employment will be terminated without notice or compensation in lieu thereof, for cause

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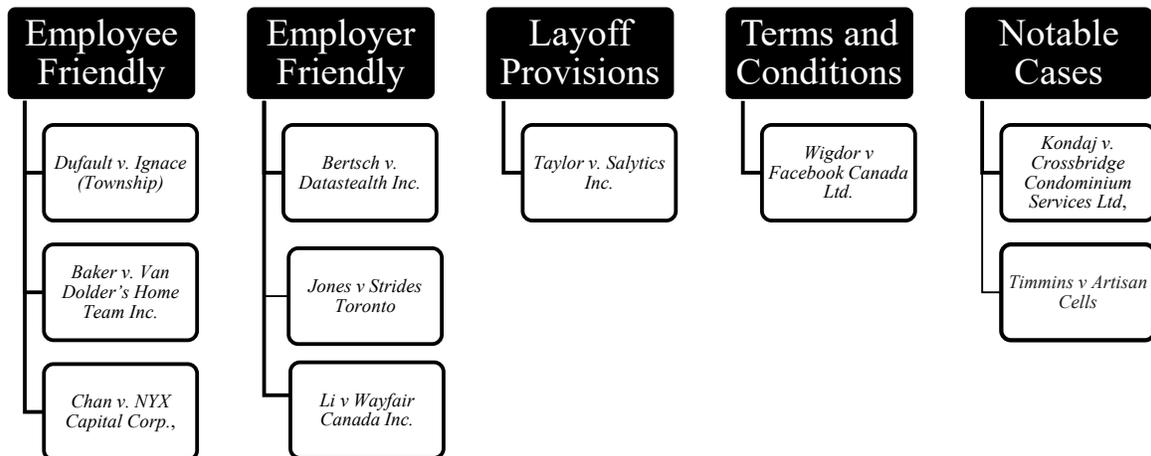
▼ *Dufault v. Ignace (Township)*, 2024 ONCA 915

- Lower court found presence of “at any time” and termination in employer’s “sole discretion” invalidated without cause provision
- ONCA expressly upheld lower court decision solely on basis of “for cause” provision, which expanded definition of ESA cause
- Denied leave to appeal to SCC

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▼
Recent
Developments in
the Caselaw

Recent Termination Cases



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“Bad” Language – At any time

Baker v. Van Dolder's Home Team Inc., 2025 ONSC 952

- First case to follow and cite *Dufault*
- Plaintiff cited *Dufault* lower court decision for principle that “at any time” invalidates provision
 - “I must apply *Dufault*, as none of the reasons to depart from a prior decision referenced in *Spruce Mills* are applicable. As such, the “without cause” termination provision is unenforceable.”

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▼ At any time

Jones v. Strides Toronto, 2025 ONSC 2482

- Court found the *Dufault* decision does not stand for the proposition that the words “at any time” divorced from “sole discretion” are improper in an employment contract
- Did not find that “at any time” in the termination clause in this case brings it into conflict with the ESA and makes it unenforceable
- Decision did not reference *Baker v. Van Dolder’s Home Team Inc*
- Court ultimately invalidated termination clause on basis that it could be read as not requiring continuation of benefits during the notice period

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▼ At any time – enforceable?

Li v Wayfair Canada Inc., 2025 ONSC 2959

- With cause provision contained “at any time”
- Court distinguished the language in *Dufault* finding that the use of “at any time” does not automatically render a termination provision unenforceable
- Distinguished the termination language from that examined in *Baker v Van Dolder’s Home Team* but did not say on what basis
- Did not reference *Jones v Strides Toronto*

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▼ At any time – enforceable?

Li v Wayfair Canada Inc., 2025 ONSC 2959

- Reading of the agreement, as a whole, leads to conclusion that the agreement sought to limit obligations to those under the ESA
- Defined cause as ESA standard
- Language was enforceable!
 - Agreement not reproduced or appended to decision
- Bonus fun – court found RSUs would have continued to vest during common law notice period

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▼ Bad” Language – At any time

- *Chan v. NYX Capital Corp.*, 2025 ONSC 4561
 - The Court found that the termination provisions were void and unenforceable for several reasons, one of which was that the employment agreement purported to allow for termination “at any time without cause”, which is in violation of the ESA, citing *Dufault* and *Baker*
 - The Court did not cite or engage with the recent favourable decisions in *Jones* or *Li v Wayfair*

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▼ Good Language

Bertsch v. Datastealth Inc., 2025 ONCA 379

- ONCA upheld lower court, found termination language was enforceable

Termination of Employment by the Company: If your employment is terminated with or without cause, you will be provided with only the minimum payments and entitlements, if any, owed to you under the [Ontario Employment Standards Act, 2000](#) and its Regulations, as may be amended from time to time (the "ESA"), including but not limited to outstanding wages, vacation pay, and any minimum entitlement to notice of termination (or termination pay), severance pay (if applicable) and benefit continuation. You understand and agree that, in accordance with the ESA, there are circumstances in which you would have no entitlement to notice of termination, termination pay, severance pay or benefit continuation.

You understand and agree that compliance with the minimum requirements of the [ESA](#) satisfies any common law or contractual entitlement you may have to notice of termination of your employment, or pay in lieu thereof. You further understand and agree that this provision shall apply to you throughout your employment with the Company, regardless of its duration or any changes to your position or compensation.

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▼ *Bertsch v. Datastealth Inc.*, 2025 ONCA 379

- Very helpful reasoning
- Court found that the issue is not whether an *ordinary* person might arrive at an incorrect interpretation, but how the agreement can be *reasonably* interpreted

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Beyond the Termination Clause



Layoff Provisions

Taylor v. Salytics Inc., 2025 ONSC 3461

- ONSC reviewed layoff provision in the context of a claim of constructive dismissal for being temporarily laid off
- Agreement contained a provision, nested under the heading “Termination”, which stated:

Salytics may terminate your employment at any time for cause.

[...]

In the event a temporary lay-off is ever required, it may be implemented in accordance with the requirements of the *Employment Standards Act, 2000*.

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▼ *Taylor v. Salytics Inc.*, 2025 ONSC 3461

- Parties agreed for cause language was unenforceable
 - Employee argued that had the effect of invalidating the contractual layoff provision, which would make the placing of the employee on layoff a constructive dismissal
 - Employer argued that since a contractual layoff is not a constructive dismissal, it is not a termination provision and therefore not invalidated by the illegal “for cause” language
- Court found that the placement of the contractual layoff provision under the “termination” heading could not be determinative of whether it was a termination clause

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▼ *Taylor v. Salytics Inc.*, 2025 ONSC 3461

- Court found that a lay-off is only a termination when there is no clause in the agreement permitting the employer to lay off the employee
- When there is such a clause, the layoff is not a constructive dismissal, and therefore not a termination
- Acknowledged this was a bit of a chicken and egg situation

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▼ Terms and Conditions During Stat Notice Period

Wigdor v Facebook Canada Ltd. (July 8, 2025)

- Court found that RSU agreements which terminate vesting immediately upon termination, without regard to the statutory notice period, do not violate the ESA and are enforceable
- Judge contrasted the language under s. 61 of the ESA, where pay in lieu of notice is provided, with s. 60
 - Section 60 requires that employers maintain all terms and conditions of employment during the statutory notice period

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▼ *Wigdor v Facebook Canada Ltd.*

Requirements during notice period

60 (1) During a notice period under [section 57](#) or [58](#), the employer,

- (a) shall not reduce the employee's wage rate or alter any other term or condition of employment;
- (b) shall in each week pay the employee the wages the employee is entitled to receive, which in no case shall be less than his or her regular wages for a regular work week; and
- (c) shall continue to make whatever benefit plan contributions would be required to be made in order to maintain the employee's benefits under the plan until the end of the notice period. 2000, c. 41, s. 60 (1).

Pay instead of notice

61 (1) An employer may terminate the employment of an employee without notice or with less notice than is required under [section 57](#) or [58](#) if the employer,

- (a) pays to the employee termination pay in a lump sum equal to the amount the employee would have been entitled to receive under [section 60](#) had notice been given in accordance with that section; and
- (b) continues to make whatever benefit plan contributions would be required to be made in order to maintain the benefits to which the employee would have been entitled had he or she continued to be employed during the period of notice that he or she would otherwise have been entitled to receive. 2000, c. 41, s. 61 (1); [2001, c. 9](#), Sched. I, s. 1 (14).

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▼ *Wigdor v Facebook Canada Ltd.*

- Judge found section 61 does not have same requirement, only requires employers to:
 1. Continue to make benefit plan contributions and pay the amount; and
 2. Pay employee the amount they would have been entitled to based on “regular wages” – which do not include RSUs
- RSU rights were governed by separate agreements not treated the same way as rights under his employment contract (*Mikelsteins*)
 - Contractual entitlements are independent of relief under employment agreement, ESA, or the common law

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▼ Noteworthy Cases

- *Timmins v Artisan Cells*, 2025 CanLII 2387 (ON SC)
 - Novel argument to invalidate termination clause
 - Claimed the exclusive jurisdiction clause which required parties to submit to the exclusive jurisdiction of the Ontario Courts ousted the Ontario Ministry of Labour from resolving disputes which could be statutorily raised with the Ministry which violated the ESA
 - Statement of Defence was withdrawn
 - Court declined to invalidate the termination clause on this novel ground without the issue being fully argued

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▼ Best Practices

- Best practices for drafting termination clauses:
 - Clear and unambiguous
 - Notice, pay-in lieu of notice, or a combination of both
 - Flat amount or a formula that grows over time (with or without a cap)
 - Lump-sum or salary continuance (clawback?)
 - Calculation of payments – what is included?
 - Benefit continuation
 - Mitigation

▼ Best Practices

- Best practices for drafting termination clauses:
 - Notice and/or payments are inclusive of any and all entitlements to notice, pay in lieu of notice, benefits and severance pay under statute, contract or common law
 - **Saving provision → In all cases, entitlements will not fall below employment standards minimums**
 - If offering more than employment standards minimums, consider requiring a Full and Final Release for amounts over and above the minimums

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Survey – It only takes a minute!



Human Resource Professionals Association (HRPA) Code:
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Ontario and/or Quebec CPD Certificate



Law Society of British Columbia

The session has been loaded with the LSBC and is titled "Employment Agreements and Termination Clauses – the Most Recent Developments in the Law – September 17, 2025".

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Areas of Expertise

Labour, Employment & Human Rights | Labour Relations and Collective Bargaining | Human Rights & Discrimination | Employment Advice and Litigation | Automotive

Education

2002, LLB, University of Victoria
1995, B Comm, McMaster University

Jurisdiction

Ontario, 2003

Language

English

Mathias Link has advised and represented employers with respect to labour, employment and human rights law matters for more than 20 years. His practice includes defending employers in wrongful dismissal actions, human rights complaints, grievance arbitrations, certification applications, unfair labour practice complaints, claims under the *Employment Standards Act, 2000* and *Canada Labour Code* as well as disability benefits claims related actions.

Mathias acts as lead spokesperson in collective bargaining on behalf of employers and assists employers with negotiation strategy and providing ongoing advice regarding collective agreement administration.

Mathias also provides clients with strategic advice with respect to the employee related aspects of corporate restructurings, drafts employee and independent contractor agreements and reviews and provides advice concerning workplace policies in areas such as the duty to accommodate, harassment and discrimination.

Mathias spent a year as in-house counsel with one of North America's largest financial institutions. There, he provided legal and practical advice on matters focusing on employment law, human rights, employment contracts, privacy legislation and disability benefits claims.

Mathias is a frequent speaker at Ontario Bar Association and Lancaster House seminars and contributes to publications such as *Lexpert*, *Canadian Corporate Counsel* magazine and *Canadian Labour and Employment Law for the U.S. Practitioner* and is co-author of the chapter on Canadian Employment and Labour Law for the *International Comparative Legal Guide*.

Rankings and Awards

- *Canadian Legal Lexpert Directory 2023-2025* Recognized in the Canadian Legal Lexpert Directory as Repeatedly Recommended in Labour Relations
- *Canadian Legal Lexpert Directory 2022-2025* Recognized in the Canadian Legal Lexpert Directory as Repeatedly Recommended in Employment Law
- *Lexpert 2022* Recognized in the Canadian Legal Lexpert Directory in Workplace Human Rights
- *Lexpert 2020-2021* Recognized in the Canadian Legal Lexpert Directory in Labour Relations
- *Lexpert 2020* Recognized in the Canadian Legal Lexpert Directory in Employment Law

Memberships and Affiliations

- Member, American Bar Association, Labour and Employment Law Section
- Member, Canadian Association of Counsel to Employers (CACE)
- Member, Canadian Bar Association
- Member, Ontario Bar Association
- Member, Society for Human Resource Management (SHRM)
- Member, The Law Society of Upper Canada (Ontario)



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Education

2021, JD, Osgoode Hall Law School at York University

2017, BA (Honours), Political Science and Criminology, University of Toronto

Jurisdiction

Ontario, 2022

Language

English

Felisha Jagiah practices in all areas of labour, employment, and human rights law. She represents and advises employers on a wide range of workplace issues.

Felisha's experience includes providing both private and public-sector employers with practical advice on minimum employment standards, wrongful dismissal claims, grievances, and human rights complaints. She prepares a range of legal documents, including workplace policies and employment contracts.

Felisha received her Juris Doctor from Osgoode Hall Law School at York University. In law school, Felisha was an editor for *Obiter Dicta*, Osgoode's student newspaper, and worked in the I.D. Clinic of the Community and Legal Aid Services Program, assisting low-income members of the community with their applications for government identification documents. She also completed an internship with the Employment Law Unit of the New York City Legal Aid Society.

Before attending law school, she obtained an Honours Bachelor of Arts in Political Science and Criminology at the University of Toronto.

Prior to Fasken, Felisha was an Associate at a boutique labour and employment firm in Toronto.

Memberships and Affiliations

- Member, Ontario Bar Association
- Member, Canadian Bar Association
- Member, The Advocates' Society

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